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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 207

WILLIAM J. ROCHELLE, JR., Trustee in Bankruptcy of Major Appliance Company, Inc.,

Petitioner,

v.

CITY OF DALLAS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Opinion of the Court of Appeals is reported in *264 F. 2d 166*. The Opinion of the District Court (R. 29-30) was not reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 25, 1959 (Pet. 13-18). Petition for rehearing was denied on April 15, 1959. The Petition for Writ of Certiorari was filed July 13, 1959. The jurisdiction of this Court is invoked under *28 U. S. C., § 1254(1)*.

QUESTION PRESENTED

Whether the 1952 amendment to § 67C of the Bankruptcy Act invalidates the claimed lien of the City of Dallas as against the Trustee in Bankruptcy.

STATUTES INVOLVED

The Petitioner has correctly stated the Statutes involved, and in addition thereto, the Federal Statutory provision involved is *Subdivision b of § 67C of the Bankruptcy Act, 11 U. S. C. § 107C*, which provides:

> "(b) The provisions of section 96 of this title to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this title by or against him. *Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require th[illegible]ns to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.*" (Emphasis supplied.)

Furthermore, the statutory lien under Section 194 of the Home Rule Charter of the City of Dallas here under consideration has the force and effect of a State Statute, since the Charter was granted to the City of Dallas by an act of

the Legislature in 1907. See *City of Dallas v. Western Electric Company, 83 Tex. 243, 18 S. W. 552.* The Fifth Circuit Court, in the case of *City of Dallas v. Crippen, 171 F. 2d 526,* so treated this lien.

STATEMENT

The Petitioner has correctly stated the record insofar as it applies to this proceeding.

RESPONDENT'S BRIEF AND REPLY TO PETITIONER'S REASONS WHY WRIT SHOULD BE GRANTED

Petitioner submits two grounds why the Writ of Certiorari applied for should be granted, namely:

1. That the Court below has decided an important question of Federal law, which has not been, but should be settled by this Court; and,

2. Petitioner urges that the decision of the Court below is erroneous because:

   a. The Court of Appeals erroneously held that the word "debt" as used in § 67C(2) of the Bankruptcy Act did not include "taxes"; and,

   b. That the Bankruptcy Statute invalidates the statutory liens for taxes (Section 194, Charter of Dallas enacted by the Texas Legislature) because the lien is not supported by levy, seizure, recordation nor any other overt act giving notice of the lien, in order to be deemed perfected.

By way of reply, Respondent would show:

1. The City of Dallas has a perfected true general lien under Section 194 of its Charter and has been sustained as such in 1933 in the case of *In Re Brannon, 62 F. 2d 959*, where the Fifth Circuit, in construing these liens, said:

> "We think a true general lien for all city taxes is given the city of Dallas by the language last quoted, which adheres to the property notwithstanding its transfer and which, requiring no record, is good as a lien in bankruptcy. All property of the taxpayer falls under it, so that it is unnecessary to identify that assessed for the particular tax."

The validity of this lien—the lien of the City of Dallas—was reaffirmed in 1949 by the Fifth Circuit Court in the case of *City of Dallas v. Crippen, 171 F. 2d 526*, again in 1954 in *Brans v. City of Dallas, 217 F. 2d 640.* In the *Brans* case, the Court said:

> "Under settled law, the City had a tax lien on the properties, from the sale of which the funds in the trustee's hands were derived and, to the extent necessary to discharge the debt secured by the lien, the proceeds of the sale of the property were withdrawn from or taken out of the assets of the estate."

The Court further, in a footnote, cited the case of *DeLaney v. City and County of Denver, Tenth Circuit, 185 F. 2d 246*, which holds that the Bankruptcy Court was duty bound to recognize a lien for taxes, even though the City did not within the six months' period prove up its claim, because the trustee took the bankrupt's assets subject to said lien.

The liens recognized in *In Re Brannon* (Supra), *City of Dallas v. Crippen* (Supra) and *Brans v. City of Dallas* (Supra), were again recognized and given force in an insolvency proceedings in the case of *Exchange Bank and Trust Company v. Tubbs Manufacturing Company, 246 F. 2d 141 (Certiorari Denied).*

The Texas courts have likewise sustained the validity and have given force and effect to the statutory lien of the City of Dallas under its Charter in the cases of *Texas Employers' Insurance Association v. City of Dallas, 5 S. W. 2d 614 (Writ Refused)*, and the case of *Urbish v. City of Dallas, 260 S. W. 2d 148.*

2. In the alternative, if the lien of the City of Dallas created by Charter is inchoate and needs perfection, then the lien became perfected by the filing of the claim of the City of Dallas in the Bankruptcy Court. *§ 67(b) of the Bankruptcy Act (11 U. S. C. § 107B); In Re Etherton, 88 F. Supp. 874.*

3. The lien of the City of Dallas attached to the Bankrupt's property, on January 1 of the taxable year involved. *In Re Brannon* (Supra). In the *City of Dallas v. Crippen* (Supra), the taxpayer became bankrupt on February 26, 1947, at which time the taxes were as yet not assessed. The City claimed taxes for the year 1947 as of January 1. The fact that the taxes were not assessed until later in the year was of no import because the lien attached as of January 1.

4. The word "debt" as used in Section 67C(2) of the Bankruptcy Act is not synonymous and does not include the word "taxes" as clearly stated by the District Court in this case, when the Court said:

> "Our legislative bodies have quite uniformly treated the subject of taxes in separate columns, titles and chapters from those obligations of man designated as 'debts'. The amendment in question makes no reference whatever to taxes. Taxes are ordinarily as in this case made a lien as a matter of law while a debt due for labor or material, for instance must be filed and a record made of the claim. An overt act is required of claimant. Not so in case of claim for taxes.
>
> "To merge claims for debts and taxes in one common category would render taxes uncollectible in cases of this type, or at least require the City to foresee the faltering steps of the taxpayer and run a race with other creditors to be first to get possession by consent, attachment or some drastic ancillary process. We think clearly that the purpose of the amendment did not contemplate such."

5. Moreover, the Court of Appeals in affirming the judgment of the District Court stated that:

> "For the reasons stated by them and for the additional reasons following, we agreed with these views. Recourse to any work of reference dealing with words and their meaning, including particularly Words and Phrases, Vol. 11, 'Debt', at pages 278 to 286, where numerous instances in point appear, will show that while occasionally the words 'debts' and 'Taxes' are used interchangeably, ordinarily this is not so. Indeed in most instances they are used distinctively. This established, it follows that to support a construction of a statute that the word 'debt' includes taxes, there must be some reasons shown to so read a statute other than the fact that sometimes the word 'debt' will in-

clude taxes. This reason must be sought in the purpose of the statute, that is the mischief sought to be prevented and the appropriate means to achieve that end. The mischief here, it seems clear to us, was to protect creditors of the bankrupt against secret or hidden liens for the security of debts. The means was to invalidate them as against the trustee. The City's lien asserted here is not a secret or hidden lien, and is, therefore, we think not within the mischief to be prevented. On the contrary, the law which gives the lien at once puts the prospective purchaser of, or dealer with, property on notice to inquire, and furnishes him with the means to find out, if and what taxes are due and owing. *Fisher v. Rio Tire Co.*, 65 S. W. 2d 751; *City of Dallas v. Menezes*, 16 F. 2d 779; Remington on Bankruptcy, Vol. 4, Sec. 1637.1."

6. All taxes—Federal, State and local—have always occupied a favored position in the administration of a bankruptcy estate as will be noted by the refusal of Congress to permit a bankrupt to be discharged from the payment of taxes upon securing a final discharge from bankruptcy. *Section 17, Bankruptcy Act (11 U. S. C. A., Section 35); United States v. Bernstein, 16 F. 2d 233; In Re Salsbury Motors, Inc., 104 F. Sup. 482; Ernst v. Hingeley, 118 P. 2d 795.*

7. The Petitioner's contention that the word "debt" as used in the Bankruptcy Act has a precise meaning not susceptible to inquiry into the legislative purpose of it; that a construction of the Bankruptcy Act indicates that taxes are "provable debts" and that under the provisions of the Bankruptcy Act itself, the word "debt" is defined to include provable claims, including "taxes" as one subdivision of the general class, is patently without merit.

8. It is well settled that taxes are not "debts" in the ordinary sense within the Bankruptcy Act. A review of the Bankruptcy Act in its entirety, and the construction placed on various sections thereof, readily reveals that the word "debts" as used in various sections of this Act, does not have the same broad meaning in one section as it may have in another, and it is not synonymous with the word "taxes" and does not mean "taxes" in all sections of the Bankruptcy Act. *In Re United Button Company, 140 F. 495, 502, 503.*

The Court, in the case of *In Re United Button Company* (Supra), in holding that a tax is not a debt, said:

> "A tax is not strictly a debt. It lacks the nature of a debt in that, though for a sum certain, it is not founded upon any agreement or assent of the person or persons against whom it is assessed, but for a burden for public purposes imposed, invitum * * *."

9. The contention that the word "debt" as used in the Bankruptcy Act has a precise meaning not susceptible to inquiry into the legislative purpose of it is untenable. This contention was clearly answered in the Referee's Opinion in the case at bar when he said:

> "It seems to me that in the absence of a definite expression of legislative intent by Congress to change a previously existing rule in a substantial way, that interpretation of statutory language, if it is a permissible interpretation, should be adopted which makes the least change in the previously settled law."

10. The statutory lien of the City of Dallas arising by virtue of Section 194 of its Charter adheres to the property coming into the hands of the Bankruptcy Court and need

not be proved as a debt arising ex contractu or ex delicto, but the Bankruptcy Court must take notice of such lien without the necessity of filing a claim therefor, as was held in the case of *Brans v. City of Dallas* (Supra), and the case of *DeLaney v. City and County of Denver* (Supra).

In the *Brans* case, the Court said:

> "Because the bankruptcy court has power to displace existing liens on property only to the extent to which it imposes them upon the proceeds thereof, and the City was entitled to have its lien paid therefrom without regard to whether and when it filed a claim. * * *."

11. Under the several Constitutions of the States, taxation is required to be equal and uniform on real and personal property alike unless the Constitution itself provides for a different method of taxation. The Supreme Court of the United States has always recognized liens on real property in bankruptcy proceedings. See *United States v. City of New Britain, 347 U. S. 81*, and *United States v. Atlantic Municipal Corporation, 212 F. 2d 709*. Petitioners in this case make no claim that all statutory liens supporting taxes in favor of the State or its political subdivisions are nullified by the present Bankruptcy Act, but their contention is merely that the statutory liens supporting taxes on personal property are void. If this contention is sustained, then the inevitable result will be that the sovereign state and its political subdivisions will be denied the efficacy of a uniform method of enforcement in the collection of its taxes, and thus bring about, by judicial construction, a discrimination as between real and personal property taxpayers.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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I, H. P. KUCERA, counsel for City of Dallas, Texas, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 6, 1959, I served a copy of the foregoing Reply to Petition for Writ of Certiorari on the Petitioner herein by depositing the same in a United States mail box with first class postage prepaid, addressed to Marvin S. Sloman, Esq., his Counsel of Record, at his Post Office address, 1700 Mercantile Bank Building, Dallas 1, Texas.

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